Supreme Court, U.S.
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No. 95-41

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

STEPHEN A. ZIMMERMAN,
Petitioner,

v.

OFFICERS FOR JUSTICE; UNITED STATES OF AMERICA;
CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation;
SAN FRANCISCO POLICE DEPARTMENT;
CIVIL SERVICE COMMISSION OF THE
CITY AND COUNTY OF SAN FRANCISCO;
SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

(Docket No. CV-73-0657-CAL and CV-77-02884-CAL, In the US District Court for the Northern District of California) (Docket No. 93-17179, In the US Court of Appeals for the Ninth Circuit)

PETITION FOR A WRIT OF CERTIORARI

Date: July 5, 1995

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Consent Decree employment affirmative action plan favoring racial minorities and women via a de facto quota system affecting the San Francisco Police Department ("SFPD") in violation of the equal protection and/or due process clauses of the U.S. Constitution and thus unconstitutional and should it be reviewed under the "strict scrutiny" and "narrowly tailored" test, in light of the U.S. Supreme Court's recent decisions requiring the affirmative action plan to be subject to the "strict scrutiny" and "narrowly tailored" tests mandated by this court in *Adarand Constructors, Inc. v. Pena*, ____ U.S. ____, 63 U.S.L.W. 4523 (June 12, 1995), *Missouri v. Jenkins*, ____ U.S. ____, 63 U.S.L.W. 4486 (June 12, 1995), and *Miller et al. v. Johnson et al.*, ____ U.S. ____, 63 U.S.L.W. ____ 95 California Daily Journal (D.A.R.) 8495 (June 29, 1995)?

2. Should Petitioner be allowed to intervene in the underlying Consent Decree litigation as a plaintiff as of right under Federal Rules of Civil Procedure, Rule 24(a), so that he can raise a challenge to the Consent Decree under the new case law decided by this Court?

3. Should Petitioner be allowed to intervene in the underlying Consent Decree litigation under the "permissive intervention" rules allowed by Federal Rule of Civil Procedure, Rule 24(b), so that he can raise a challenge to the Consent Decree under the new case law decided by this Court?

LIST OF PARTIES

The parties to the proceeding below are the Petitioner: Stephen A. Zimmerman, and the Respondents: Officers for Justice, United States of America, City and County of San Francisco, San Francisco Police Department, Civil Service Commission of the City and County of San Francisco, and the San Francisco Police Officers Association. Nathaniel Trives, Auditor Monitor of the Consent Decree, is not a party, but has been served a courtesy copy of this petition.

There are no other parties.

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I.

OPINIONS BELOW

The Memorandum Decision of April 13, 1995 of the United States Court of Appeals for the Ninth Circuit was not published in the Federal Reporter, but this Memorandum Decision of the United States Court of Appeals is

attached in the Appendix hereto, as Appendix "A," *infra.* The Minute Order of October 22, 1993 of the United States District Court for the Northern District of California, denying Petitioner's Motion to Intervene is attached hereto in the Appendix as Appendix "B."

II.

JURISDICTION

This court has jurisdiction to review the Decision and Order of the U.S. Court of Appeals for the Ninth Circuit under 28 U.S. Code section 1254. Respondents invoked federal jurisdiction under 42 U.S. Code § 2000e, in the underlying litigation, alleging race and sex discrimination in employment.

Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. The Memorandum Decision of the Ninth Circuit, affirming the District Court Order, was issued on April 13, 1995.

The jurisdiction of this court to review the judgment of the Ninth Circuit U.S. Court of Appeals is invoked under 28 U.S. Code sections 1254 and 1291.

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S. Code section 2000e governs race and sex discrimination in employment in the underlying actions. 28 U.S. Code section 1291 governs appeals from final decisions of District Courts and 28 U.S. Code section 1254 governs certiorari in this court. The Courts of Appeals have jurisdiction over appeals from all final decisions of the District Courts of the United States, under 28 U.S. Code section 1291. The equal protection clause and due process clause of the Fifth and Fourth Amendments to the U.S. Constitution are also involved in this case.

These constitutional provisions and statutes are attached hereto in the Appendix as Appendix "C."

IV.

STATEMENT OF THE CASE

In 1973, the "Officers for Justice," a group of racial minority and female San Francisco Police Department officers,[1] filed the initial lawsuit in this case in U.S. District Court for the Northern District of California, Case No. C-73-0657-CAL. The plaintiffs claimed that the San Francisco Police Department ("SFPD") defendants had actually practiced discrimination against them in hiring and promotion policies and created adverse impact against these minorities and women. The suit was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S. Code § 2000e.

In 1977, the United States of America, ("USA") filed a separate lawsuit against the Defendants, City and County of San Francisco, Civil Service Commission, SFPD, *et al.*, Case No. C-77-02884-CAL, in the U.S. District Court for the Northern District of California, which also claimed discrimination against racial minorities and women in violation of EEOC Guidelines and 42 U.S. Code § 2000e. Both cases were consolidated. The San Francisco Police Officers Association ("POA"), the union to which Petitioner belonged, intervened as a Defendant in both actions.

In March, 1979, two weeks after trial began, the parties entered into a settlement of both cases by means of a Consent Decree which was issued in March, 1979 by the District Court. The court issuing the Consent Decree did not make any findings of fact or law as to whether there had

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[1]The Officers for Justice ("OFJ") were comprised mainly of black officers, with some Hispanics, Asians and women.

been any actual past discrimination by SFPD against plaintiffs, and expressly stated that the Defendants did not admit or concede the constitutionality or legality of any findings of the court as to past discrimination practices. The Consent Decree by its own terms was supposed to self-terminate and expire in March, 1989, ten years after its beginning. However, endless delays occurred, and on or about October 27, 1986, the lower court issued a "1986 Supplemental Order," which was intended to impose a "three year plan" for expediting promotional and hiring exams in the SFPD in order to meet the original timetable of the Consent Decree so that the entire Consent Decree could be terminated in 1989. This Order banned any officer from inspecting, verifying his score on exams or challenging any promotional exams, and totally denied officers any due process rights to challenge the validity of all future promotional exams, via any court proceedings.

Despite the express language of both the 1986 Supplemental Order and the Consent Decree, the Consent Decree did not terminate in 1989, has become perpetual and continues in full force to this date. The District Court and the Respondents have agreed to perpetuate the Decree for political reasons, in order to pursue vague societal goals aimed at reaching racial quotas, goals in hiring, and promotion in the SFPD. The situation has become so divorced from any truly remedial purpose that the SFPD now recruits from outside San Francisco, and has turned the SFPD into a social engineering laboratory in pursuit of vague goals of "equality," so that local politicians can curry favor with minority interest groups.

On or about April, 1993, the Consent Decree Division of the SFPD, action in concert with Respondents, administered an exam for promotion to lieutenant (rank "Q-60") in the SFPD, which exam Petitioner took. He was one of 255 examinees. He is a white male officer, with a rank of sergeant, Q-50, one rank below lieutenant.

The exam scoring was clouded in utmost secrecy, no scoring keys or standards were ever revealed to the examinees, and no examinee was allowed to verify his score.

On or about September 15, 1993, scores were released, and Petitioner ranked number 191 out of 255, a low score which made him ineligible for promotion to lieutenant, since only the top 100 examinees were eligible, under the "banding" rules of the Consent Decree.

On September 17, 1993, plaintiffs "Officers for Justice" and the United States of America filed court papers contesting the validity and job relatedness of the April 1993 lieutenant's exam, and a temporary stay order was issued by the District Court. On or about October 13, 1993, Petitioner filed a motion to intervene as a plaintiff in the underlying litigation, in order to challenge the test validity and constitutionality of the Consent Decree and 1986 Supplemental Order and the affirmative action plan. His motion to intervene was denied at a summary hearing on October 22, 1993, a hearing in which the Petitioner's counsel was served with Respondents' opposition briefs at 5:00 p.m. on the day before the hearing, and given no opportunity to file a brief in rebuttal. The POA union joined all the other Respondents in opposing Petitioner's Motion to Intervene. A copy of the District Court's Minute Order denying intervention is attached as Appendix B.

The District Court denied the motion to intervene primarily because it felt that Petitioner could not demonstrate "adverse impact" on white males in the test results—a clear use of racial and gender quotas and statistical models in EEOC Guidelines.

On November 12, 1993, Appellant filed a Notice of Appeal with the U.S. Court of Appeal for the Ninth Circuit. On April 13, 1995, the Court of Appeal issued its Memorandum Decision affirming the lower court's order denying the

motion for intervention. A copy of this Ninth Circuit Decision is attached as Appendix A.

In the underlying litigation, there has never been a finding of fact by the district court as to whether or not the Respondents SFPD and the City and County of San Francisco *et al.* had ever practiced actual discrimination against racial minorities or female officers in the SFPD, as to hiring and/or promotional practices, at any time. Nonetheless, the Consent Decree affirmative action plan has continued to exist and has never been tested as to whether it meets the "strict scrutiny" test, or the "narrowly tailored" test.

Meanwhile, the racial and gender composition of the SFPD has drastically changed since the Consent Decree was issued in 1979. Today 45 percent of the SFPD is minority, 12 percent is female, and this meets the main goals of the Decree, yet the Decree lives on perpetually. The District Court and all Respondents refuse to end the decree because of political vested interests in its perpetuation. White male officers, such as Petitioner, have no way to challenge the constitutionality or perpetuity of the Decree, unless they are allowed to intervene.

The Consent Decree Division ("CDD"), a hybrid federal-local agency which now controls SFPD hiring and promotion, has operated in total secrecy. The CDD refuses to allow Petitioner or any other individual white police officer access to exam documents or scoring keys, and the CDD has totally superseded the local San Francisco Civil Service Commission Rules and City Charter. Minorities and women, however, are allowed access to exam verification material, via the OFJ.

Yet no individual white officer is allowed to challenge any portion of the Decree or its progeny of orders, as intervention has been denied by the District Court. In 1989, Petitioner was a member of a class action suit brought by white

male SFPD officers, *Ratti v. City* and *County of San Francisco et al.*, challenging the Consent Decree. That action was dismissed under then-existing laws.

Delays by the CDD have been constant and seemingly deliberate. In April, 1993, the CDD of the SFPD gave the first Q-60 lieutenant's exam since 1982, after a gap of 11 years, and 7 years behind schedule. Petitioner contends this exam was scored and graded in a totally arbitrary and secretive manner. He was ranked number 191 out of 255 officers who took the exam. Because of the "banding" system used by the CDD, only persons in the top 100 ranks were eligible for promotion to lieutenant.

Petitioner's motion to intervene was based, *inter alia*, on a desire to challenge the validity and scoring of the exam, and to challenge many other practices and decisions taken by the CDD and Respondents pursuant to the Consent Decree, and to challenge the Consent Decree by alleging that it expired by its own terms and should have terminated in 1989 and that it violates his constitutional rights to equal protection and due process of the laws.

There is no party in the underlying cases which adequately represents Petitioner's interest in this matter. The POA (San Francisco Police Officers Association union) has already intervened as a defendant, and toes the party line with the other Respondents, in upholding the secretive exam and the perpetuation of the Consent Decree.

Petitioner in September, 1993 and in January, 1994 filed administrative exam challenges as protest appeals, challenging certain limited issues in the Q-60 exam, pursuant to the limited rights allowed by the 1986 Supplemental Order, namely, computational errors in the exam scoring, improper administration of the exam, and the fact that the Respondents allegedly allowed many ineligible candidates to take the exam. An administrative pro forma hearing was held

December 10, 1993, and Petitioner's appeal was summarily denied. Appellant filed a Petition for Writ of Mandamus to the Superior Court of California, San Francisco County, Case No.957917, which was also denied. That Petition, however, only raised the narrow issues of eligibility of certain candidates, computational errors and other trivial matters allowed by the 1986 Supplemental Order.

It should be pointed out that because of the extremely narrow scope of protest/appeals issues allowed according to the 1986 Supplemental Order, Petitioner was not allowed to challenge the essential content, substance or scoring keys of the exam or the Consent Decree or Supplemental Order and therefore his only remedy to raise these issues is through intervention in the case at bench.

V.

THE REASONS WHY A WRIT OF CERTIORARI SHOULD BE ISSUED

Petitioner, Stephen A. Zimmerman, hereby petitions the U.S. Supreme Court to issue a Writ of Certiorari on his case. Petitioner contends that his Petition for Writ of Certiorari presents numerous issues of nationwide significance on federal questions regarding affirmative action which this court should address at this time. The main issue why the Court should grant certiorari is that, in light of three recent cases which this Court decided in June, 1995, concerning the unconstitutional nature of certain affirmative action and other race preference plans, the underlying Consent Decree and 1986 Supplement Order in the case at bench may well be unconstitutional, for they violate the equal protection and due process clauses of the U.S. Constitution. The rationale which the Court used in its three cases should be applied to the case at bench to declare affirmative action plans in employment unconstitutional and thereby allow the Petitioner an opportunity to intervene to make this argument. Intervention is justified under Federal Rule of Civil Proce-

dure, Rule 24(a) and Rule 24(b) as well. This court should definitively address the issue of whether employment affirmative action plans must satisfy the "strict scrutiny" and "narrowly tailored" tests to pass constitutional muster.

As the law currently stands, there is a great conflict among the circuits on this issue and the Ninth Circuit's Decision is contrary to this Court's recent June 1995 decisions in *Adarand Constructors, Inc. v. Pena*, ____ U.S. ____, 63 U.S.L.W. 4523 (June 12, 1995), wherein this Court held that all racial classifications imposed by government actors, including federal, state and local entities, are subject to the "strict scrutiny" test and can satisfy the equal protection clause of the 5th and 14th Amendments of the U.S. Constitution only if the racial classifications are "narrowly tailored" to further "compelling government interests." This Court also held that affirmative action plans based on racial classifications can be held valid if and only if they redress specific racial discrimination patterns which actually were found as a matter of fact and law to have existed in the past.

In the case at bench, there was never any finding of fact or law by the U.S. District Court for the Northern District of California, or any other court, that there has been any kind of racial discrimination practiced against racial minorities or women by the San Francisco Police Department at any time in the past. In fact, the two underlying lawsuits were settled in March, 1979, two weeks after trial began, before any verdict was issued. The words of the Consent Decree clearly stated that the court made no finding of fact as to whether or not there had been any racial discrimination against racial minorities or women in the past, and that the Defendants did not concede or admit any such findings of past discrimination. As such, under the new *Adarand* rule, if this court extends it to employment practices, the affirmative action plan of the SFPD is subject to the "strict scrutiny" test and should be deemed invalid. At least, Petitioner should be

allowed to intervene in the District Courts in order to make these arguments before that court at this time, under the new law which now governs this case.

This Court's ruling in *Adarand* is complemented and extended by its ruling in *Missouri v. Jenkins*, ____ U.S. ____, 63 U.S.L.W. 4486 (June 12, 1995), a case in which this Court struck down a federal district court's order requiring salary increases for instructional and non-instructional school district employees and other remedial affirmative action orders which were components of a comprehensive affirmative action program to improve "desegregative attractiveness" and "suburban comparability" of the predominately minority urban school districts in the Kansas City area. The rationale of this Court in both the *Missouri v. Jenkins* and *Adarand Constructors, Inc. v. Pena* cases should be applied to affirmative action employee programs such as the one involving the SFPD, in the case at bench. Thus, there is a basis to grant a Writ of Certiorari in order to review the affirmative action plan imposed by the Consent Decree in the federal district court in the case at bench.

There is another important reason why a Writ of Certiorari should issue in this case: to enable this Court to hold whether the "strict scrutiny" test should be applied to judge the constitutional validity of employment affirmative action plans involving sex-based preferences. This is so because the SFPD Consent Decree in the case at bench applies quotas equally to racial minorities and *women*. This Court in *Adarand* and *Missouri* did not address whether sex-based preferences in affirmative action plans had to satisfy the strict scrutiny test.

The case at bench offers the Court an ideal case to decide whether sex-based preferences are constitutional by the strict scrutiny test, and thus to decide an issue of national importance this time.

A. THE CONSENT DECREE, AND SUPPLEMENTAL ORDER AFFIRMATIVE ACTION PLAN IN THIS CASE SHOULD BE HELD SUBJECT TO STRICT SCRUTINY AND NARROW TAILORING REQUIREMENTS

In *Adarand Constructors, Inc. v. Pena*, ____ U.S. ____, 63 U.S.L.W. 4523 (June 12, 1995), Petitioner Adarand Constructors, Inc. claimed that the federal government's practice of giving general contractors in government projects the financial incentive to hire subcontractors controlled by "social and economically disadvantaged individuals," and in particular the government's use of race-based presumptions in identifying such individuals, violated the equal protection clause of the Fifth and Fourteen Amendments. The U.S. Supreme Court concluded that courts should analyze cases of this kind under a different standard of review, namely, "strict scrutiny." Specifically, this Court held in *Adarand* that the use of race-based presumptions violated Adarand's right to equal protection under the Constitution.

This Court held in *Adarand* that "the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race . . . should be subjected to detailed judicial inquiry to insure that the personal right to equal protection of the laws has not been infringed." The Court also held that, "*We* hold today that all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."

The ruling by this Court in *Adarand, supra*, clearly should be applied to the case at bench and is a reason for granting certiorari, to enable this court to determine whether the strict scrutiny test should specifically apply to affirmative

action plans involving employment in a local police department or similar local entity in an underlying action filed under 42 U.S. Code §2000e, involving both race and sex preferential hiring and promotional policies.

There is no question that the Consent Decree's affirmative action plan in the case at bench is a race-based and sex-based preferential hiring and promotional plan designed exclusively to meet certain "goals" as to percentage of minority and women officers in the SFPD. That the Decree's original lifespan was originally limited to ten years (1979-1989) and that this lifespan has been extended indefinitely by the Respondents clearly suggests that the Decree's affirmative action plan was not "narrowly tailored" sufficiently to pass constitutional muster.

Similarly, in *Missouri v. Jenkins, supra*, as in *Adarand*, this court held that the "strict scrutiny" test must be applied to race-based court orders or decrees involving public school desegregation. In *Missouri v. Jenkins, supra*, this court found that an affirmative action desegregation *inter*district remedial plan was unconstitutional and violated the equal protection clause because there had been no specific factual finding by the courts that there had ever been an *inter*district violation of black people's rights by the Kansas City school district. That is, this Court held that it was unconstitutional for the district court to go beyond any original *intra*district finding of fact of racial discrimination in crafting a remedial plan.

Similarly, in the case at bench, the Federal District Court never made any specific finding there had been racial or gender discrimination practiced by the SFPD in the past. The Consent Decree itself, and particularly its extension beyond its original ten year lifespan into perpetuity, clearly is analogous to the Kansas City district court's order which was struck down by this Court in *Missouri v. Jenkins, supra.* As the Court pointed out in *Missouri v. Jenkins*, "The

record does not support the District Court's reliance on 'white flight' as a justification for a permissible expansion of its *intra*district remedial authority through its pursuit of desegregative attractiveness." In the *Missouri v. Jenkins* case, as in the case at bench, the district court clearly went beyond any specific remedial basis and sought to impose general affirmative action desegregative plans for meeting general *inter*district societal goals of racial equality. This is what the Court condemned. In *Missouri v. Jenkins*, the Supreme Court granted certiorari specifically to determine not only whether the District Court exceeded its constitutional authority in ordering salary increases to all employees of the Kansas City School District, but also to determine whether the District Court had properly relied on the fact that student achievement test scores had failed to rise to some unspecified arbitrary level in failing to find that the state had achieved partial unitary status as to equality of education programs.

The factual situation in *Missouri v. Jenkins* is strikingly similar to that in the case at bench. Both cases involve perpetual desegregation or affirmative action plans exceeding fifteen years. This Court condemned the fact that there was an unlimited "duration" of the Kansas City District Court's plan, similar to the one in the case at bench. This Court struck down the Kansas City District Court's pursuit of "desegregative attractiveness" as a means of desegregating Kansas City schools. This Court in *Missouri v. Jenkins* specifically pointed out that the District Court in Kansas City had made no specific findings of fact in its order and that said order was therefore invalid. This Court also pointed out that many of the goals of the Kansas City quality education plan had already been attained, thus reducing the need to perpetuate the plan. In short, this Court condemned the Kansas City District Court's attempt to go beyond its original remedial functions and to extend its plan in perpetuity to some vague societal notion designed to

meet arbitrary goals based on race. The exact same thing can be said of the case at bench. Since there was no finding of racial discrimination in the past by the U.S. District Court of San Francisco, there is no legitimate remedial function performed by the affirmative action plan of the District Court's Consent Decree and its perpetuation beyond 1989 by and through the Supplemental Order.

Finally, in the case of *Miller et al. v. Johnson et al.*, ____ U.S. ____, 63 U.S.L.W. ____ (June 29, 1995), 95 California Daily Journal (D.A.R.) 8495 (June 29, 1995), this Court issued yet a third major decision relevant to the case at bench, in which it condemned Georgia's congressional redistricting plan for violating the equal protection clause of the Constitution. In *Miller v. Johnson, supra*, this Court struck down a congressional redistricting plan where race was "the predominant factor" in making the plan. In the case at bench, it is clear that race is the predominant factor in the District Court's Consent Decree affirmative action plan.[2] The Georgia congressional redistricting plan clearly intended to use race as the predominant factor to insure that at least three congressional districts had black majorities which would elect black people to Congress. This is clearly a type of affirmative action plan designed to increase black representation in Congress. It is similar to the Consent Decree of the SFPD in the case at bench. This court held that the Voting Rights Act, 42 U.S. Code § 1973(b), did not require the type of redistricting plan which the Georgia legislature drew up, and that the plan was not sufficiently narrowly tailored to pass constitutional muster. This Court said that the equal protection clause of the Fourteenth Amendment has as its central mandate a "racial neutrality in governmental decision making." This Court in *Miller v.*

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[2] In the case at bench, as explained *supra*, gender is also a predominant factor in the Consent Decree's affirmative action plan. The Court should address this issue.

Johnson applied the strict scrutiny test and said that to satisfy strict scrutiny, the state must demonstrate that its redistricting legislation is narrowly tailored to achieve a compelling governmental interest. The Court found that the redistricting was not done to remedy past discrimination but rather just to meet some general societal goals of racial equality. As the Court pointed out in the *Miller* case, "instead of grounding its objection on evidence of a discriminatory purpose, it would appear that the government was driven by its policy of maximizing majority black districts."

Similarly, in the case at bench, the Consent Decree is not based on narrowly tailored remedial measures aimed at eradicating a discriminatory purpose in SFPD promotions or hiring, but rather on a policy of "maximizing majority black" officer positions in promotion and hiring, even to the extent of the SFPD's recruiting now in cities outside San Francisco in order to recruit more and more minorities.[3]

It is submitted that the rationale of this Court in its three June 1995 cases should be applied to the case at bench.

B. PETITIONER SHOULD BE GRANTED LEAVE TO INTERVENE AS OF RIGHT UNDER FRCP RULE 24(a)

Case law is clear that this Court should review the issue of intervention. In the case at bench, the intervention issue is closely related and subsidiary to the chief issue presented above (whether the strict scrutiny test should be applied to the kind of employment affirmative action plan involved herein), and is thereby properly before this Court.

In *Izumi Seimitsu Kogyu Kabushiki Kaisha v. U.S. Philips Corp.*, ____ U.S. ____, 114 S.Ct. 425 (1993), 126

[3]The original Consent Decree required all SFPD recruits to live in San Francisco. But in early 1995, Respondents and the District Court stipulated to waive that restriction.

L.Ed.2d 396 (1993), this Court held that a motion to intervene could be entertained on certiorari by the Supreme Court if the intervention itself and a major issue of national importance is also raised in the Petition for Writ of Certiorari. This Court held that Supreme Court Rule 14.1(a) would allow the intervention issue to be raised if intervention is presented as an issue in the petition, if it is fairly included with the main issue raised, or if the Supreme Court's disposition of the motion to intervene involves an important question constituting an exceptional case.

Where the Court is likely to enunciate an important new principle of law, it should grant certiorari to review the intervention issue also. See *Izumi, supra.*

In light of the new change in the law as described above, it is clear that Petitioner should be given leave to intervene in the underlying litigation under Federal Rule of Civil Procedure, Rule 24(a), so he can challenge the Consent Decree and Order. In the Ninth Circuit Court's Memorandum Decision of April 13, 1995, the immediate issue confronted by the court below was whether appellant should have been allowed to intervene in the underlying litigation to challenge the Consent Decree and the method of the promotional exam implemented pursuant to the Consent Decree and the 1986 Supplemental Order. Given that the Consent Decree now should be held subject to the "strict scrutiny" test and given that it is probably invalid and unconstitutional as a violation of Petitioner's equal protection rights because, *inter alia*, there has never been a court finding of fact of race discrimination by the SFPD and because the Consent Decree has vastly exceeded its original lifespan and remedial purpose and is not "narrowly tailored" to meet a compelling government purpose, clearly Petitioner should be allowed to intervene in order to make these arguments. The U.S. Court of Appeals for the Ninth Circuit, in its decision of April 13, 1995, decided that Petitioner

met the first two criteria for intervention under Federal Rule of Civil Procedure, Rule 24(a), but not the second two. Petitioner argues this is clearly wrong, and that he meets all four criteria.

The Court of Appeals found that petitioner met the first two criteria, namely, that he had a protectable interest in the litigation and that his intervention was timely. However, it erroneously held that Petitioner failed to show that he would offer any "necessary element to the proceedings that the other parties would neglect," and that he failed to make the required minimal showing of "inadequate representation." But the truth is that Petitioner would surely have added a "necessary element to the proceedings that the other parties would neglect," namely, a challenge to the Consent Decree on constitutional grounds of equal protection and due process. In addition, Petitioner's interests were not adequately represented by the Police Officers Association ("POA") union because the POA was itself an intervenor-defendant in the original litigation, was not neutral, and was clearly opposed to Petitioner's position in the entire matter. The POA sided with the other Respondents in vigorously opposing Petitioner's Motion to Intervene, and in enthusiastically supporting the perpetuation of the Consent Decree and Supplemental Order and exam in question. Respondents all toed the same party line, and none of them adequately represented Petitioner's interests. Contrary to the Court of Appeals' decision, there is no evidence that the POA or any of the other parties were willing to insure that the lieutenant's examination was valid or job related.

In *O'Shea v. City and County of San Francisco*, 966 F.2d 305, (9th Cir. 1992), the Ninth Circuit Court of Appeals found that nominal representation by a union of a member does not necessarily bar an action of an individual officer and does not necessarily mean that the officer is adequately

represented by the union. In accord is *Barfus v. City of Miami*, 936 F.2d 1182 (11th Cir. 1991).

From the point of view of this Court's decision on whether to grant certiorari, Petitioner contends that a major national interest is at stake here, namely, this Court should decide whether individual white male police officers or similarly situated public employees are entitled to intervene as of right and/or as of permission in a Consent Decree case where they want to challenge an affirmative action plan and where their union and other parties to the plan do not represent their interests and refuse to represent them on this issue. The only way in which any individual white male public employees can seriously challenge any employment affirmative action plan (now rendered suspect under this Court's new decisions in *Adarand v. Pena, supra, Missouri v. Jenkins, supra, and Miller v. Johnson, supra*) is by intervention. Intervention is the sole tool to enable an individual employee to challenge a now-suspect Consent Decree.

One of the bases of the District Court's decision denying Petitioner's motion for intervention was that Petitioner was found unable to demonstrate "adverse impact" against white males who took the April 1993, lieutenant's exam. However, the "adverse impact" statistical model is arguably unconstitutional at this point, in light of the *Adarand, Miller* and *Missouri* cases which this Court decided in June 1995. That is, it would seem that the rationale of those three June, 1995 cases of this Court would make it unconstitutional and a violation of the equal protection clause for a District Court to block a white male petitioner from intervening in a case unless he showed "adverse impact" in a statistical sense against white males. "Adverse impact" is a statistical model that has nothing to do with whether or not there was a past pattern of actual racial discrimination by an employer against minorities. Rather, it is an arbitrary statistical model

criterion imposed by the EEOC guidelines which is intended to insure that each racial and gender group must have at least 80% of its proportion selected to be promoted or hired by the employer. This concept of adverse impact or "disparate impact" clearly may have been rendered obsolete and null and void under the Court's new case decisions. Certainly, this issue arises here and is worth granting certiorari to examine.

C. PETITIONER SHOULD BE ALLOWED TO INTERVENE VIA "PERMISSIVE INTERVENTION" UNDER FEDERAL RULE OF CIVIL PROCEDURE, RULE 24(b)

The third basic issue presented before this Court is whether Petitioner should be allowed to intervene under the "permissive" intervention standards of Federal Rule of Civil Procedure, Rule 24(b). According to Rule 24(b) and case law which interprets it, there is a rather broad standard for permissive intervention, namely, that the intervenor must show that his "claim or defense and the main action have a question of law or fact in common." This is a very broad standard, but it is clear in the case at bench that Petitioner's claim and the main action do have questions of law and fact in common, especially the questions of law relating to the constitutionality of the affirmative action plan imposed by the Consent Decree, in light of this court's new rulings in *Adarand, Missouri* and *Miller, supra*, as discussed *supra*.

The circuits are in conflict and uncertainty regarding exactly which criteria should be used to determine whether a party should be granted permissive intervention under Rule 24(b). For example, in the 9th Circuit we have the vague standard set forth in *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977).

This Court should address the issue here and lay down specific criteria for permissive intervention in a case such as that at bench.

VI.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: July 5, 1995 Respectfully submitted,

Stanley G. Hilton
Attorney for Petitioner
Stephen A. Zimmerman

APPENDIX "A"

No. 93-17179
D.C. No. CV-73-0657-CAL

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OFFICERS FOR JUSTICE;
UNITED STATES OF AMERICA,
Plaintiffs-Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
Defendant-Appellee.

STEPHEN A. ZIMMERMAN,
Applicant in
intervention-Appellant.

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Submitted April 4, 1995**
San Francisco, California
Filed April 13, 1995

MEMORANDUM*

Before: BRUNETTI, THOMPSON and HAWKINS,
Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

OVERVIEW

Stephen A. Zimmerman, a Caucasian male police officer, appeals the district court's denial of his motion to intervene, pursuant to Federal Rules of Civil Procedure 24(a) and 24(b), in an action contesting the validity of a San Francisco Police Department promotion examination. The examination was created and administered under the auspices of a consent decree settling a racial and sexual discrimination suit against the City of San Francisco. We affirm.

FACTS

In 1973, individual racial minority and female police officers, as well as the Officers for Justice (OFJ), an organization representing minority officers, sued the City and County of San Francisco (City) alleging discrimination in hiring and promoting pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* In 1977, the San Francisco Police Officers Association (POA) intervened as a defendant. The United States Department of Justice (DOJ) subsequently sued the City for discriminatory employment practices. This suit was consolidated with that brought by the OFJ.

In 1979, the district court entered a consent decree in *Officers for Justice v. Civil Serv. Comm'n of the City and County of San Francisco*, 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983), which was signed by the City, the DOJ, the OFJ, and the POA (collectively, Appellees), settling the lawsuit. The consent decree, which was intended to govern selection procedures for ten years, required the City to promote a certain number of officers and prohibited the City from using methods in its hiring and promotions that would adversely impact women and minorities.

Because of delays in administering promotional examinations, the City failed to make most of the required promotions. To expedite the process, in 1986 the district court, with the consent of the parties, entered a "Supplemental Order." The order, *inter, alia*, strictly limited and delineated the opportunities for either the parties or individual officers to challenge the promotional examinations. It recognized that "[t]he review procedures afforded ... individual officers[ ] have been recurrent sources of delay in the administration of examinations and the adoption of eligibility lists. The parties agree that, unless altered, those procedures are certain to disrupt the Plan and prevent its implementation within the remaining life of the Decree."

Pursuant to the supplemental order, "[i]ndividual officers may protest/appeal only with respect to alleged irregularities in the administration of the examination itself, typographical errors, computational errors in scaring and the listing on a tentative eligible list of a person or persons allegedly ineligible for promotion." However, the order also provided that:

> Protests/appeals by individual officers shall not be allowed nor entertained with respect to the appropriateness or adequacy of the various components of a particular examination procedure including, but not limited to, the adequacy of [the] job analysis, the examination announcement and the terms thereof, the setting of component weights and cut-off scores, the validity and/or job relatedness of an examination in whole or in part, and the development, establishment, accuracy[,] and appropriateness of the scoring key or keys. Any such matters can only be raised by the parties.

In 1989, most of the required promotions still had not been made because of delays in the test development process. Consequently, the district court held a hearing, after

which it ruled that the decree would not terminate by its own terms, but rather only with the court's approval.

A City-retained expert, in consultation with experts retained by the other parties, developed the Q-60 lieutenant's examination over approximately a four-year period. In April 1993, the examination was given to 255 candidates. In August 1993, the City provided the parties and their experts with the scores for the examination by race and gender, which reflected that the examination adversely impacted Blacks, but not any other group, including Caucasian males.

On September 15, 1993, Zimmerman received his score which ranked him 193 out of 255 candidates. He filed an administrative protest in accordance with the procedures set forth in the supplemental order. Zimmerman then moved to intervene on an expedited basis, filing his motion with the district court on October 6, 1993. He alleged that because the examination was arbitrarily scored, ineligible candidates were allowed to take the examination, and because the examination was not job-related, Caucasian males as a group were adversely impacted.

At the hearing on October 22, 1993, the district court denied his motion to intervene, finding that: (1) the supplemental order barred Zimmerman's individual challenge to the examination; (2) the Q-60 examination did not have an adverse impact on Caucasian males; (3) Zimmerman lacked a redressable injury, because his low score made him ineligible for promotion;[1] (4) Zimmerman's interests were

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[1]The city proposed, and the court eventually approved, a plan to promote the first 23 officers on the Q-60 list using a "sliding band," whereby candidates ranking 24 to 130 would be viewed as equally qualified and promoted on the basis of an interview and consideration of experience, training, professional certification, community service, education, and affirmative action goals. Zimmerman has not raised "banding" as an issue on appeal.

adequately represented by the POA; and (5) intervention would cause "inevitable" delay. This appeal followed.

DISCUSSION

A. Intervention as a Matter of Right

Under Federal Rule of Civil Procedure 24(a)(2), an applicant is entitled to intervene as a matter of right if: (1) the application for intervention is timely; (2) the applicant has an interest in the transaction which is the subject matter of the pending litigation; (3) the applicant's ability to protect his interest would be impaired unless intervention were allowed; and (4) the applicant's interest is not adequately represented by the present parties. *United States ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991). Unless the applicant satisfies all four criteria, intervention must be denied. *Yniguez*, 939 F.2d at 731. We review de novo the denial of a motion to intervene pursuant to Rule 24(a)(2). *Id.*

To the extent that Zimmerman wishes to challenge the design and administration of the lieutenant's examination, his application is timely. He could have no knowledge of any alleged testing improprieties until after the test was administered.[2]

Zimmerman, however, also wishes to challenge both the consent decree and the district court's interpretation of it; specifically, the restriction of individual officers' rights to challenge the testing procedure and the extension of the decree's expiration date.[3] Zimmerman, a police officer since

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[2]The district court apparently came to the same conclusion, telling appellees, "I'm not really—not really persuaded by a timeliness type of argument."

[3]Zimmerman never raised these issues before the district court.

1977 and member of the POA, should have brought this challenge when the supplemental order was entered in 1989, and therefore, his motion to intervene on these bases is untimely. *Compare Officers for Justice v. Civil Service Commission of San Francisco*, 934 F.2d 1092 (9th Cir. 1991) (in same litigation, officer moved to intervene one month after POA changed its position that the decree automatically expired in 1989).

Appellees correctly argue that Zimmerman lacks standing to raise his claims of racial discrimination. On appeal, Zimmerman concedes that Caucasian males were not adversely impacted by either the design or administration of the test. Furthermore, as a Caucasian male, he cannot assert a claim of discriminatory treatment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

However, Zimmerman also alleges that the test was improperly designed and administered. To this extent, Zimmerman asserts a protectable interest in the litigation. *See Officers for Justice v. Civil Service Comm'n*, Civ. No. 73-0657, slip op. at 4 (N.D. Cal. July 25, 1991) (finding that "the subject of the consent decree is the promotion of San Francisco police officers within the department," and therefore prospective intervenor, as a police officer, "asserted a sufficient interest relating to the subject matter of the litigation").[4]

Although Zimmerman meets the first two requirements for intervention of right, he does not meet the last two. Denying his application to intervene will not preclude him from protecting his interest in valid test design and administration. The supplemental order sets forth adequate proce-

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[4]Appellees also contend Zimmerman lacks standing because his examination score was so low that rescoring would be futile. However, if the administrative errors were as gross as Zimmerman alleges, rescoring or retesting might make him eligible for promotion.

dures through which Zimmerman may raise his allegations of scoring errors and the testing of ineligible candidates.[5]

The only interest Zimmerman cannot protect outside these proceedings is ensuring that the promotion examination is job-related, because such an issue may only be raised by a party, pursuant to the supplemental order. However, this incorrectly assumes that parties to the litigation, including the POA, inadequately represent Zimmerman.

All of the parties to the decree, but most particularly the POA, are willing, and certain, to ensure that the lieutenant's examination is valid and job-related. *See California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986). Zimmerman has failed to suggest any credible reason why he and the POA would not share a common interest in ensuring union members are promoted through a fair and just testing procedure. *Id.* Nor has Zimmerman shown that he will offer any necessary element to the proceedings that the other parties would neglect. *Id.* Zimmerman has thus failed to make the required "minimal showing" of inadequacy. *Id.*

In sum, the district court properly denied Zimmerman's motion to intervene as a matter of right.

B. Permissive Intervention

"Where a would-be intervenor does not demonstrate interests sufficiently weighty to warrant intervention as of right, the court may nevertheless consider eligibility for permissive intervention under Fed. R. Civ. P. 24 (b) (2)."

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[5]We express no view on the constitutionality of these procedures. *See* note 7, *supra*. we note, however, that Zimmerman has never alleged that the procedures set forth in the supplemental order were inadequate to protect his interests. Regardless, even absent these procedures, the POA adequately represents Zimmerman's interests in test design and administration. *See supra*.

Garza v. County of Los Angeles, 918 F.2d 763, 777 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). A district court has "broad discretion" to grant or deny permissive intervention. *County of Orange v. Air California*, 799 F.2d 535, 539 (9th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).[6]

Even assuming Zimmerman has met all of Rule 24(b)'s prerequisites, the district court did not abuse its discretion in barring his intervention. The certainty of prejudice to the parties, as well as judicial economy, weigh heavily against allowing Zimmerman to intervene. *See Venegas v. Skaggs*, 867 F. 2d 527, 530-31 (9th Cir. 1989) (court must consider equitable factors of judicial economy, adequacy of representation, and prejudice), *aff'd sub nom. Venegas v. Mitchell*, 495 U.S. 82 (1990). The POA continues to adequately represent Zimmerman's interests, and thus denying him intervention will not prejudice him. On the other hand, permitting Zimmerman's intervention would prejudice the existing parties to the litigation. These proceedings, which have consumed decades of the court's and parties, time, are finally nearing conclusion. To allow Zimmerman to intervene at this late date would, as the district court found, "inevitably" prejudice the rights of the parties, and further complicate and delay this highly complex case.[7]

AFFIRMED.

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[6]Suggesting we review the permissive intervention issue de novo, Zimmerman cites to *Beckman Indus., Inc. v. International Insur. Co.*, 966 F.2d 470, 472 (9th Cir. 1992). *Beckman* is inapposite. Unlike *Beckman*, this case does not require us to interpret Rule 24(b)

[7]Because we hold that Zimmerman was properly denied intervention, we need not address whether the supplemental order is unconstitutional. In addition, we find that the district court did not err in denying Zimmerman the opportunity to file a reply brief. Zimmerman invited any error by stipulating to an expedited briefing schedule. He also had the opportunity to reply to opposing arguments at the motion hearing.

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL PRETRIAL MINUTES

Date: October 22, 1993

Case No. C73-0657 CAL — Judge: Charles A. Legge. Title: Officers for Justice -v- Civil Service Commission. Attorneys: Carmela Castellano, Stanley Hilton, Duane Heno, Laurie Giorgi/Phil York. Deputy Clerk: Rufino Santos. Court Reporter: Carl Pline.

PROCEEDINGS

☐ Pltf's ☐ Deft's 1. Intervenor's motion to Intervene.

DISPOSITION

☐ GRANTED ☒ DENIED ☐ WITHDRAWN
☐ OFF CALENDAR

☐ GRANTED/DENIED ☐ SUBMITTED
☐ CONTINUED

Order to be prepared by: ☐ Pltf ☐ Deft ☐ Court

Case continued to _____ for Further Status Conference Case continued to _____ for Motions (Motion due _____, Opposition _____, Reply _____), Case continued to _____ for Pretrial Conference, Case continued to _____ for Trial (Court/Jury: ____ Days), Case continued to _____ for _____, Discovery Cutoff: _____ Designated Experts by _____ .

ORDERED AFTER HEARING: Intervention is denied because this type of action is prohibited by the supplemental order of 1986.

Filed: October 22, 1993

Charles A. Legge, Judge

Richard W. Wiekins, Clerk
U.S. District Court
Northern District of California

APPENDIX "C"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE:

1. Equal protection and due process clauses of the 14th Amendment to the U.S. Constitution.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Due process clause of the 5th Amendment to the U.S. Constitution:

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 28 U.S. Code Section 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

4. 28 U.S. Code Section 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

5. 42 U.S. Code Section 2000e-2(a)

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

6. 42 U.S. Code Section 2000e-5(f) (g)

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master. (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which

is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its

discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purpose of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment prac-

tice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited

to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual ws refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

Supreme Court, U.S.
FILED
SEP 7 1995
CLERK

No. 95-41

In the Supreme Court of the United States

OCTOBER TERM, 1995

STEPHEN A. ZIMMERMAN, PETITIONER

v.

OFFICERS FOR JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's denial of petitioner's motion to intervene pursuant to Rule 24, Fed. R. Civ. P.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported, but the decision is noted at 52 F.3d 334 (Table). The order of the district court (Pet. App. 1b-2b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1995. The petition for a writ of certiorari was filed on July 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Individual plaintiffs and the Officers for Justice, an organization representing various minority interests, filed suit alleging racial and sexual discrimination in the employment practices of the San Francisco Police Department. The San Francisco Police Officers Association (POA), a union representing member police officers, intervened as a defendant. The United States subsequently filed suit alleging that the Department had engaged in discriminatory employment practices. The suits were consolidated. Pet. App. 2a.

In 1979, all parties, including the POA, signed a consent decree that was approved by the district court. See *Officers for Justice* v. *Civil Serv. Comm'n of City & County of San Francisco*, 473 F. Supp. 801 (N.D. Cal. 1979), aff'd, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). In explaining its approval of the parties' agreement, the district court noted that "[b]lacks, Hispanics and Asians were and continue to be substantially underrepresented," particularly among higher-ranking officers, 473 F. Supp. at 804; that written examinations for promotion "displayed a substantial adverse statistical impact on minorities who took them" and had not been shown to be job-related, *ibid.*; that other selection criteria had a significant adverse impact on minorities and women, *id.* at 804-805; and that "substantial evidence of intentional discrimination was presented to th[e] court" during the litigation, *id.* at 805. The court also observed that the consent decree "includes no racial quotas or preferences" but rather "emphasizes equal opportunity in the future, not redress for past wrongs." *Id.* at 808. The decree required the City to

make a specified number of promotions and prohibited it from using hiring and promotional practices that would have an adverse impact on women and minorities. Pet. App. 2a.

Because of delays in administering promotional examinations, the district court in 1986 entered a "Supplemental Order" pursuant to an agreement of the parties. Pet. App. 3a. Recognizing that "[t]he review procedures afforded * * * individual officers * * * ha[d] been recurrent sources of delay," the parties agreed, *inter alia*, to bar individual officers from challenging the "appropriateness or adequacy of the various components of a particular examination procedure." *Ibid.* By 1989, however, most of the required promotions still had not been made. *Ibid.* The district court therefore held a hearing and ruled that the consent decree would not terminate automatically, but only with its approval. *Id.* at 3a-4a. The parties and their experts worked together over a four-year period to develop and administer a lieutenant's promotional examination. *Id.* at 4a. That examination was given in April 1993. *Ibid.*

2. Petitioner, a white police officer and POA member who ranked 193 out of 255 candidates taking the examination, filed a motion to intervene as a matter of right, see Fed. R. Civ. P. 24(a), and for permissive intervention, see Fed. R. Civ. P. 24(b). He sought to challenge the design, administration, and scoring of the lieutenant's examination and to argue that the promotional examination had an adverse impact on white males. The district court denied petitioner's motion, finding that (1) the examination did not have an adverse impact on white males; (2) petitioner had been adequately represented by the POA;

(3) intervention would cause inevitable delay; (4) petitioner's low ranking on the examination made him ineligible for promotion; and (5) petitioner's challenge to the examination was barred by the Supplemental Order. Pet. App. 4a-5a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court first set forth the four-part test governing applications for intervention as of right:

> Under Federal Rule of Civil Procedure 24(a)(2), an applicant is entitled to intervene as a matter of right if: (1) the application for intervention is timely; (2) the applicant has an interest in the transaction which is the subject matter of the pending litigation; (3) the applicant's ability to protect his interest would be impaired unless intervention were allowed; and (4) the applicant's interest is not adequately represented by the present parties.

Id. at 5a. Insofar as petitioner sought to contest the legality of the consent decree and its implementation by the district court, the court of appeals held that his application was untimely. *Id.* at 5a-6a. The court explained that petitioner, "a police officer since 1977 and member of the POA, should have brought this challenge when the supplemental order was entered in 1989." *Ibid.* The court held that petitioner's application to intervene was timely insofar as he sought to challenge the design and administration of the 1993 examination, since petitioner "could have no knowledge of any alleged testing improprieties until after the test was administered." *Id.* at 5a. The court concluded, however, that with respect to that claim petitioner failed to satisfy the last two requirements of the four-part test, see *id.* at 6a, since the POA

could be expected to protect his interests in valid test design and administration, *id.* at 7a. The court observed that petitioner "ha[d] failed to suggest any credible reason why he and the POA would not share a common interest in ensuring union members are promoted through a fair and just testing procedure" or that he would "offer any necessary element to the proceedings that other parties would neglect." *Ibid.* Finally, the court of appeals affirmed the denial of permissive intervention based on the district court's finding that petitioner's participation would "'inevitably' prejudice the rights of the parties, and further complicate and delay this highly complex case." *Id.* at 8a.

ARGUMENT

1. "[T]he decision on any particular motion to intervene * * * is always to some extent bound up in the facts of the particular case," and such decisions are generally unlikely to raise legal issues warranting review by this Court. *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 428 (1993). Here, the court of appeals affirmed the district court's denial of intervention based on its findings that (1) the POA adequately represented petitioner's interest with regard to the 1993 promotional examination and (2) petitioner's attack on the consent decree and Supplemental Order was untimely.[1] The court of appeals'

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[1] Petitioner obscures the issue by arguing that he "would surely have added a 'necessary element to the proceedings that the other parties would neglect,' namely, a challenge to the Consent Decree on constitutional grounds of equal protection and due process." Pet. 17 (quoting Pet. App. 7a). The court of appeals squarely held that petitioner's application to intervene as of right was *untimely* insofar as petitioner sought to

decision is correct, and this Court's review of that decision would not result in the enunciation of any new principle of law. The petition for a writ of certiorari should therefore be denied. See *ibid.*[2]

2. Petitioner's principal argument (see Pet. 8) is that the Court should grant certiorari in order to consider the lawfulness of the consent decree and Supplemental Order in light of its recent decisions in *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097 (1995); *Missouri* v. *Jenkins*, 115 S. Ct. 2038 (1995); and *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995). The court of appeals did not address petitioner's contentions on the merits, however; its ruling was limited to affirmance of the district court's denial of leave to intervene. See

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challenge the consent decree and its implementation by the district court. See Pet. App. 5a-6a. The court of appeals' determination that petitioner's interests would be adequately protected by the POA applied only to petitioner's attack on the design and administration of the 1993 examination, see *id.* at 6a-7a—the aspect of petitioner's challenge that the court had found to be timely, see *id.* at 5a.

[2] Contrary to petitioner's suggestion (Pet. 17-18), the decision below is not in conflict with *Barfus* v. *City of Miami*, 936 F.2d 1182 (11th Cir. 1991), or *O'Shea* v. *City of San Francisco*, 966 F.2d 503 (9th Cir. 1992). The plaintiffs in *Barfus* and *O'Shea* did not seek to intervene in ongoing litigation, nor did they challenge the terms of a consent decree. Rather, the courts in both cases simply held that the existence of a consent decree did not prevent the plaintiffs from filing new lawsuits challenging individual employment decisions that were neither required nor prohibited by the decree itself. See *Barfus*, 936 F.2d at 1185-1189; *O'Shea*, 966 F.2d at 505-506. Moreover, *O'Shea* is a prior decision of the same court of appeals that decided the present case. Nor is there any basis for petitioner's unsupported assertion (Pet. 19) that the circuits are in conflict regarding the criteria for permissive intervention.

Pet. App. 8a n.7. Questions concerning the legality of the consent decree and implementing orders are therefore not appropriate for this Court's review. Petitioner's reliance on *Kaisha* v. *U.S. Phillips Corp.*, *supra* (see Pet. 15-16), is wholly misplaced. Despite petitioner's assertion, *Kaisha* did not hold that "[w]here the Court is likely to enunciate an important new principle of law, it should grant certiorari to review the intervention issue also." Pet. 16. To the contrary, the Court in *Kaisha* dismissed the writ of certiorari as improvidently granted rather than address an antecedent intervention question. See 114 S. Ct. at 428.[3]

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[3] In any event, this Court's recent decisions in *Adarand*, *Jenkins*, and *Miller* are of little relevance to petitioner's constitutional challenge to the consent decree and Supplemental Order. None of those cases involved a consent decree or comparable voluntary effort to redress the effects of state or local employment discrimination. Petitioner's substantial reliance on *Jenkins* (see Pet. 12-14) is particularly misplaced. See, *e.g.*, *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 522-523 (1986) (because "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree," the statutory limitations that restrict a court's power to award relief after trial "simply do not apply when the obligations are created by a consent decree"). Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992) ("state and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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